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No. 257

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Supreme Court of the United States

OCTOBER TERM, 1960

H. K. PORTER COMPANY, INC., *ET AL.*, APPELLANTS,

versus

CENTRAL VERMONT RAILWAY, INC., *ET AL.*,
APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

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APPELLEES

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF VERMONT

JURISDICTIONAL STATEMENT

This appeal is filed on behalf of the H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company. These appellants will hereinafter be referred to as "Southern Consumers".

OPINION BELOW

The opinion of the United States District Court for the District of Vermont, dated March 7, 1960, 182 F. Supp. 516, is attached hereto as Appendix "A". The final judgment of the District Court, dated March 26, 1960, is attached hereto as Appendix "B". The Order of the District Court, dated June 14, 1960, extending the time for docketing in this Court from July 5, 1960, to July 23, 1960, is attached hereto as Appendix "C". The decisions of the Interstate Commerce Commission dated May 25, 1953, and May 7, 1958, reported respectively at 288 ICC 793 and 303 ICC 743, are attached hereto as Appendices "D" and "E". The Orders of the Commission of May 7, 1958, February 19, 1959, and March 11, 1959, are attached hereto as Appendices "F", "G" and "H", respectively.

JURISDICTION

This action was brought under 28 U. S. C. 1336 and 28 U. S. C. 2321 to 2325, to set aside and enjoin an order of the Interstate Commerce Commission. The decrees of the District Court were entered on March 7, 1960, and March 26, 1960. The "Southern Consumers" filed their notice of appeal in the District Court on May 5, 1960. The Interstate Commerce Commission filed its notice of appeal on May 24, 1960, and the United States of America filed its notice of appeal on May 25, 1960.

The jurisdiction of this court is conferred by 28 U. S. C. 1253 and 2101(b).

The following decisions sustain the jurisdiction of this court to review the judgment on direct appeal in this case: *Thompson v. United States*, 343 U. S. 549; *United States et al. v. Great Northern Railway Company*, 343 U. S. 562; *State of New York v. United States*, 331 U. S. 284; and *United States v. Pennsylvania Railroad Company*, 323 U. S. 612.

STATUTES INVOLVED

The pertinent portions of the statutes involved, 49 U. S. C. 1(a), (2), (4), and (5); 49 U. S. C. 2; 49 U. S. C. 3(1); 49 U. S. C. 6(1) and (7); 49 U. S. C. 8; 49 U. S. C. 13(1); and 49 U. S. C. 16(1), are set forth in Appendix I.

QUESTIONS PRESENTED

1. Whether the District Court erred in failing to sustain the Commission's determination that the maintenance by railroads operating within the United States of single factor joint rates applicable on asbestos and related commodities from points of Canadian origin in the province of Quebec to points in official territory, while maintaining through rates (made on a combination basis) on a higher level for like service from the same Canadian origins to points in the Carolinas were unduly prejudicial to consignees in the Carolinas and unduly preferential of consignees in official territory in violation of section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)).

2. Whether the District Court erred in holding that the Interstate Commerce Commission lacked power to determine the reasonableness and justness of through rates assessed on international shipments of asbestos and related commodities, moving over through routes on through bills of lading, from Canadian origins in the province of Quebec to points in southern territory in the Carolinas.

3. Whether the Commission was authorized under Section 13(1) of the Interstate Commerce Act (49 U. S. C. 13(1)) to hear the complaints, and had jurisdiction under Section 16(1) of the Interstate Commerce Act (49 U. S. C. 16(1)), to enter an order awarding damages when it found that the assailed through transportation charges assessed by rail carriers on international shipments originating in Canada and terminating in southern territory were unjust

and unreasonable and in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. 1), when it found that the rail carriers had failed to establish just and reasonable rates, for the service rendered, from the international boundary, as required by Section 1(5), 6(1), and (7) of the Interstate Commerce Act (49 U. S. C. 1(5), 6(1), and (7)), and **in lieu thereof** had established, maintained and participated in through routes over which unjust and unreasonable through rates and charges were assessed.

4. Whether the District Court erred in holding that the Commission did not have jurisdiction over proportional rates, filed with the Commission by the Canadian carriers, applying on asbestos and related commodities from Canadian origins in the province of Quebec to East Alburgh and Newport, Vermont, duly restricted to apply only on shipments moving to destinations in the United States for use by receivers of asbestos and related commodities in constructing through transportation charges to points in the United States where no through single factor joint rates were published in the same tariff.

STATEMENT

The proceedings before the Commission, which are under review in this action, were initiated by the "Southern Consumers", appellants herein, by complaints duly filed with the Interstate Commerce Commission. The "Southern Consumers" are manufacturers of asbestos textile products and other products such as asbestos shingles. In the sale and marketing of these products throughout the United States these "Southern Consumers" are in competition with similar manufacturers of asbestos textile products and other products such as asbestos shingles who are located in what is known as official territory. Official territory may be roughly defined as that part of the United States east of the Mississippi River, north of the Ohio River and the Vir-

ginia cites such as Roanoke, Lynchburg, Richmond, and Norfolk. "The principal markets for asbestos textile products manufactured by the complainants are in official territory, and a number of competitive manufacturers are also located there." 303 ICC at page 747 (Appendix "E", p. E-7).

The basic major raw materials utilized in the manufacture of asbestos textile products and asbestos shingles are crude asbestos, asbestos fiber generally, asbestos waste, and asbestos refuse and shorts. The asbestos products named are strategic materials and are obtained by manufacturers of asbestos textile products and asbestos shingles both in the Carolinas and in official territory from asbestos producing mines located in Canada in the province of Quebec. Since the turn of the century, manufacturers located in official territory have been assessed through transportation charges from the Canadian mines based on single factor joint rates filed with the Interstate Commerce Commission in due tariff form in accordance with section 6 of the Interstate Commerce Act (49 U. S. C. 6). "Southern Consumers" have always been assessed through transportation charges constructed out of existing proportional rates from the Canadian mines to East Alburgh and Newport, Vermont, and local rates of the appellees from East Alburgh and Newport, Vermont, to the Carolina destinations at which appellants' plants are located.[1]

The proportional rates from the Canadian mines to East Alburgh and Newport, Vermont, are published in the same tariff on file with the Interstate Commerce Commission which carries the single factor joint rates from the Canadian mines to points in official territory. These proportional rates are restricted in the tariff so as not to apply

[1] The through transportation charges on asbestos waste from Canadian National Railway Company mines to Davidson, North Carolina, are determined by use of factors to and from Baltimore, Maryland.

to any intermediate point in Canada and labeled with a reference mark the explanation of which reads as follows: "Proportional rate, applicable only on shipments destined to points in the United States".

The proportional rates to East Alburgh and Newport, Vermont, are published by the Canadian National Railway Company for application from mines on its line in the province of Quebec. The line of the Canadian National Railway Company extends across the international boundary about 3.1 miles to East Alburgh, where it connects with the line of the Central Vermont Railway, Incorporated. The proportional rates to Newport are published by the Quebec Central Railway Company for application from mines on its line in the province of Quebec. The Quebec Central Railway Company extends across the international boundary about five miles to Newport, Vermont, where it connects with the Canadian Pacific Railway Company.[2]

The through transportation charges assessed the "Southern Consumers" are determined by use of the proportional rates just described and local rates from East Alburgh and Newport, Vermont, to the respective destinations in the Carolinas. These local rates are class rates excepting rates applicable on asbestos fiber from East Alburgh and Newport, Vermont, to Charlotte, Davidson, and Marshville, North Carolina, which are commodity rates. These local rates, except as noted, are the class 35 rates prescribed by the Interstate Commerce Commission in Docket No. 28300—*Class Rate Investigation*, 1939, 281 ICC 213. The commodity rates had their inception in the publication in 1936 of the then applicable class A or eighth class rate from Newport to Charlotte as a commodity rate to apply over routes not generally available under class-

[2] The Quebec Central is a subsidiary of the Canadian Pacific. See *Canadian Pacific Railway Company Lease*, 105 ICC 575, 576.

rate routing. Due to lesser general increases authorized by the Commission on commodity rates than on class rates, and the readjustment of the class rates by order of the Commission in Docket No. 28300, this Newport-Charlotte commodity rate ultimately controlled the going rates from East Alburgh and Newport, Vermont, to Charlotte, Davidson, and Marshville, North Carolina, over all authorized tariff routes, 303 ICC at page 747 (Appendix "E", pp. E-6 and E-7).

These international shipments of asbestos and other asbestos products from mines in the province of Quebec to destinations in the Carolinas and in official territory move over through tariff routes and under through bills of lading which were and are issued either by the Quebec Central Railway Company or the Canadian National Railway Company, as originating carriers. The through transportation charges were generally prepaid at origin by the consignors and billed separately to the "Southern Consumers". The Commission found that these through transportation charges had been borne in full by the "Southern Consumers". 303 ICC at page 747 (Appendix "E", p. E-7).

"Southern Consumers" by duly filed complaints with the Interstate Commerce Commission alleged that the single factor joint rates maintained by the appellees from the Canadian mine origins to destinations in official territory were unduly prejudicial to "Southern Consumers" in southern territory and unduly preferential of consignees in official territory, in violation of Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)). They also alleged that the through transportation charges assessed them were unduly prejudicial to them and unduly preferential of consumers of asbestos and other asbestos products in official territory, in violation of Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)).

The "Southern Consumers" also alleged in the complaints that the through transportation charges assessed them on the international shipments of asbestos and other asbestos products from mines in the province of Quebec to destinations in the Carolinas at which their plants are located were unjust and unreasonable, in violation of section 1 of the Interstate Commerce Act (49 U. S. C. 1) and prayed damages in the form of reparation as authorized by the Interstate Commerce Act (49 U. S. C.).

After hearings before an Examiner, receipt of original briefs, rendition of the Examiner's proposed report and recommended order, and oral argument, the Interstate Commerce Commission rendered its decision dated May 7, 1958—Appendix "E" attached hereto. The Commission's ultimate findings of fact, supported by various and sundry basic findings of fact, were to the effect that "Southern Consumers" had been and were being assessed unjust and unreasonable transportation charges and directed the complainants before it to comply with Rule 1.100 of the General Rules of Practice which relates to awards of reparation; and that "Southern Consumers'" competitors in official territory were being unduly preferred to the undue prejudice and disadvantage of the complainants in the Carolinas; and that the transportation charges assessed the "Southern Consumers" in the Carolinas were unduly prejudicial to them and unduly preferential of their competitors in official territory.

The unlawful discrimination was ordered removed. See Appendix "F" attached hereto.

Thereafter on or about June 13, 1958, the appellees filed a petition with the Interstate Commerce Commission praying for the reopening of the proceedings for oral argument before and reconsideration by the Commission. This petition was denied by order dated December 10, 1958. On or about February 20, 1959, the appellees filed a second

petition with the Interstate Commerce Commission seeking reopening of the proceedings for reconsideration and for vacation of the outstanding orders entered therein. This second petition of appellees was denied on March 11, 1959. In the order of denial the Commission clarified its finding in the decision of May 7, 1958, and accompanying order, that the rates from Quebec Central Railway Company mines to points in official territory which "appear to represent reasonable maxima" related only to the finding of unreasonableness in the past under Section 1 of the Interstate Commerce Act (49 U. S. C. 1) and to the award of reparation. See Appendix "H" attached hereto.

On March 12, 1959, the appellees instituted action in the United States District Court, District of Vermont, to enjoin and annul the orders of the Interstate Commerce Commission entered pursuant to its decision of May 7, 1958. The District Court entered its decision March 7, 1960 (Appendix "A" attached hereto), and annulled and set aside the orders of the Commission entered May 7, 1958, and February 19, 1959 (Appendices "F" and "G", respectively, attached hereto).

The order of the District Court denying motions for reconsiderations, dated March 26, 1960, is attached hereto as Appendix "B".

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

I

Appellee, Canadian National Railway Company, defended before the Commission on the ground that it participated only in the proportional rates to East Alburgh, Vermont; and thus was not subject to the Commission's jurisdiction and prayed the complaints, as to it, be dismissed. The remaining defendants before the Commission contended that only the rate factors southbound from New-

port and East Alburgh were subject to the Commission's jurisdiction. They urged that since the complaints assailed the through transportation charges, the complaints should be dismissed. 303 ICC at page 752 (Appendix "E", p. E-13).

The Commission carefully considered these contentions and held that it had jurisdiction to entertain the complaints. The Commission stated that rail carriers within the United States, subject to its jurisdiction, have an alternative with respect to participation in the handling of international traffic. The first alternative presented is that such carriers may publish rates to or from the international boundary, and if such are published, the carriers are answerable only for those rates, or, such carriers may, as a second alternative, participate in international rates and become jointly and severally liable for any unlawfulness found to exist therein. 303 ICC at page 752 (Appendix "E", p. E-13).

Jurisdiction is not a concept governed by practical consideration but is absolute. Following this concept, the Commission examined the evidence and held that the appellees, defendants before the Commission, had not established and published rates to and from the international boundary line but instead had participated in through international rates. At page 753 of 303 ICC (Appendix "E", pp. E-13 and E-14), the Commission stated that had the railroads intended the local rates from Newport and East Alburgh to apply from the international boundary, such rates should have been so published in clear and unequivocal terms. The Commission in its decision of May 7, 1958, 303 ICC at pages 753 and 754 (Appendix "E", pp. E-14 and E-15), cited certain of its decisions which made plain that it had jurisdiction over the rates and charges assessed by carriers operating in the United States from the international boundary line, and had exercised that jurisdiction. In *Newsprint Paper to Detroit*, 161 ICC 637, the Commission exercised jurisdiction because the carriers operating in the

United States had failed to publish rates from the middle of the Detroit River, which is the international boundary line, to Detroit. The Commission also cited other decisions wherein it had exercised jurisdiction to and from the international boundary line as to matters not concerned with rates.

II

The Commission dealt with the argument advanced by the railroads that it was not practical or feasible to interchange traffic at the international boundary line north of Newport and East Alburgh, Vermont, and held that it did "not see how this would affect the situation", and held that it had jurisdiction over the rail carriers to the extent of their operation within the United States regardless of the manner of rate publication. 303 ICC at page 754 (Appendix "E", p. E-15).

The District Court in its decision of March 7, 1960, Appendix "A" attached hereto, annulled and set aside the section 3 orders issued by the Commission under dates of May 7, 1958, and February 19, 1959, Appendices "F" and "G" respectively and attached hereto. This action of the District Court was based on its holding "that the carriage of freight by rail on a proportional rate from a point of origin in Canada over the international boundary to a border point within the United States for the purpose of interchange is not such transportation within the United States as will give the Commission jurisdiction over the foreign factor of the combination rate" (Appendix "A", pp. A-11 and A-12).

It will be noted that the District Court was of the opinion that the point of interchange of the traffic determined the jurisdiction of the Commission. The finding of the Commission that it had jurisdiction regardless of point of interchange was ignored.

III

The District Court erred in holding that the Commission did not have jurisdiction to determine the issues presented to the Commission for decision. The issues presented for decision involved alleged violations of Section 3 of the Interstate Commerce Act (49 U. S. C. 3), and Section 1 of the Interstate Commerce Act (49 U. S. C. 1) insofar as that Section is involved in determining the amount of damages which should be awarded under Section 16(1) of the Interstate Commerce Act (49 U. S. C. 16(1)). The issues involved through transportation charges assessed the "Southern Consumers" versus the through transportation charges assessed their competitors in official territory. It is conceded by all parties in interest that the through transportation charges assessed the competitors in official territory are based on through single factor joint rates, and that the "Southern Consumers" in their complaints before the Commission assailed the through transportation charges assessed them, and these charges were constructed out of factors applying to and from points in the United States south of the international boundary line. "Southern Consumers" complained of each through rate as a unit. They did not complain merely of the aggregate of the individual proportional and through rates customarily charged, by the defendants before the Commission, for transportation service rendered by the respective lines included in the through routes. They complained of the single charge which was assessed for the transportation service from the point of origin in Canada to the point of destination in the Carolinas.

The District Court concedes that the Commission had jurisdiction to determine the lawfulness of any international rates which are published in the form of single factor joint rates. (Appendix "A" at p. A-5). Jurisdiction of the Commission in such an instance was firmly fixed by this

Court in *News Syndicate Co. v. N. Y. Central R. Co.*, 275 U. S. 217.

The through rates assailed by the "Southern Consumers" are in fact joint through rates. The fact that these joint through rates were constructed out of existing proportional rates from the Canadian mine origins to East Alburgh and Newport, Vermont, and local rates from those points to the Carolina destinations is not of legal significance. A proportional rate, as the term implies, is simply a part of or a remainder of a through rate. *Hocking Valley Ry. Co. v. Lackawanna Coal & Lbr. Co.*, 224 Fed. 930; *Becker v. Pere Marquette R. Co.*, 28 ICC 645; *Swift & Co. v. Erie R. Co.*, 45 ICC 554. A proportional rate is of the nature of a division of a joint through rate. The amount of compensation the different carriers receive for the service rendered in connection with the through rate is of no concern whatsoever to the "Southern Consumers". Their only interest is that the through transportation charge be reasonable as a whole, and free of undue discrimination in any form or manner. If the through transportation charges assessed by the participating carriers are unreasonable or otherwise unlawful, they are jointly and severally responsible for the unlawfulness. *Louisville & N. R. Co. v. Sloss-Sheffield S. & I. Co.*, 269 U. S. 217.

It is immaterial in the instant case that international shipments are involved rather than domestic shipments moving entirely within the confines of the United States. This fact was made plain by this Court in *Great Northern Ry. Co. v. Sullivan*, 294 U. S. 458. In the *Sullivan case* the complainant before the Commission challenged the lawfulness of the American factor of a through international rate and did not attack either the Canadian factor or the through transportation charges resulting from the addition of the two factors. The Commission found that the assailed American factor was unreasonable and awarded reparation. This

Court held that such could not be because under the circumstances of the case it had to **assume** that the through transportation charge was reasonable. This Court reiterated that the shippers' only interest is that the through ate be reasonable as a whole and cited in support thereof the *Sloss-Sheffield case.* The through rates involved in the *Sloss-Sheffield case* and the *Sullivan case* were in fact joint through rates even though they were constructed on a so-called combination basis.

Further—it is clear that there is no legal distinction between a through rate published as a single factor joint rate and a through rate applicable over a through route. The District Court and the appellees err when they contend that an arrangement between participating carriers **only exist** when the joint rate is published in single factor form. This Court in *Thompson v. United States,* 343 U. S. 549, made it plain that a "through route" is an arrangement, express or implied, between participating carriers for the continuous carriage of goods from the origin point to the destination point; and that this through carriage implies a "through rate" which may be an aggregate of the separate rates fixed independently by the separate carriers forming the through route. This Court in so holding cited *Through Routes and Through Rates,* 12 ICC 163, 166, decided by the Interstate Commerce Commission in 1907. In that case the Commission pointed out that Section 6 of the Act (49 U. S. C. 6) contemplated different forms of tariff publication in the establishment of through rates.

IV

In the instant case the "Southern Consumers" assailed the through transportation charges assessed their competitors in official territory as being unlawful under Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)) and the Commission found that unlawful discrimination

existed. The "Southern Consumers" also alleged that the through transportation charges assessed them were likewise unlawful under Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)) and the Commission found unlawful discrimination existed. It entered a cease and desist order, Appendix "F" attached hereto, requiring the removal of the unlawfulness.

The District Court is in error when it held the assailed through transportation charges from the Canadian mines to "Southern Consumers'" plants in the Carolinas are divisible and considered separately the individual factors out of which the through transportation charges were constructed. The District Court, by its holding, makes it impossible for the Commission to determine the lawfulness under Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)) of the rate adjustment which had been complained of as being unduly discriminatory. Due to the method of tariff publication the Commission could not possibly compare charges assessed "Southern Consumers" with those assessed their competitors in official territory for the transportation service rendered from the interchange points in Vermont. Single factor joint rates were assessed their competitors in official territory. The defendants before the Commission did not reveal the charges assessed the official territory competitors from the interchange points to destinations in official territory. If such a charge existed in tariff form, it was the duty of the defendant railroads to reveal the charges to the Commission. *Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co.*, 283 U. S. 654.

The District Court's holding that the proportional rates from the Canadian mines to East Alburgh and Newport, Vermont, was not subject to the Commission's jurisdiction under Section 1(a) and (2) of the Interstate Commerce Act (49 U. S. C. 1(a) and (2)) was the basis for annulling the

orders of the Commission which had been entered under Section 3(1) of the Act (49 U. S. C. 3(1)). The jurisdiction of the Commission under Section 3(1) of the Act (49 U. S. C. 3(1)) does not depend upon its jurisdiction under Section 1(a) and (2) of the Act (49 U. S. C. 1(a) and (2)). *Houston, E. & W. T. R. Co. v. United States*, 234 U. S. 342. In the *cited case* this Court held that Congress had delegated all its inherent powers to the Interstate Commerce Commission to enable that Commission to prohibit railroads rendering a transportation service within the confines of the United States from engaging in unlawful discrimination and practices—such as granting selected shippers undue preferred treatment to the undue prejudice of other shippers. In the instant case the Commission found that the single factor through joint rates on asbestos and related commodities from the Canadian mines to destinations in official territory unduly prefers receivers of asbestos in that territory and unduly prejudices "Southern Consumers" in the Carolinas. Under this finding the Commission had authority under Section 3(1) of the Act (49 U. S. C. 3(1)) to prohibit the continuation of the unlawful discrimination even though asbestos had never actually moved from Canadian mines to destinations in the Carolinas due to lack of rates or routes. *State of New York v. United States*, 331 U. S. 284.

The Commission also found that the through rates assessed "Southern Consumers" were unduly prejudicial to them and unduly preferential of their competitors in official territory. Undue prejudice may be inflicted as effectively by a through rate which is a combination rate as by a joint through rate. In *United States v. Illinois Cent. R. Co.*, 263 U. S. 515, at page 527, this Court said:

> A through route was established; and the transportation is performed as the result of this arrange-

ment between the carriers, express or implied.[3] Undue prejudice may be inflicted as effectively by a through rate which is a combination of locals, as by a joint through rate. The power of the Commission to remove the unjust discrimination exists in both classes of cases.

The questions presented by this appeal are substantial and of public importance, for should the decision of the District Court be permitted to stand, "Southern Consumers" of asbestos would be at the mercy of appellee railroads. By the simple selection of method of tariff publication the appellees could destroy any business enterprise in the United States which depended on raw materials produced in an adjacent foreign country. The appellees could engage in unlawful discrimination at will. This could be accomplished through manipulation as to method of tariff publication and it is respectfully suggested that **no such possibility** was contemplated by the Congress when it enacted Section 3(1) of the Interstate Commerce Act (49 U. S. C. 3(1)).

In *Interstate Commerce Commission v. B. & O. R. R.*, 225 U. S. 326, this Court said:

> Tariffs are but forms of words, and the Interstate Commerce Commission, in the exercise of its power to administer the Act to Regulate Commerce, can look beyond the forms to what caused them and what they are intended to, and do, cause.

V

The Commission did not enter an order specifying the amount of damages sustained by the appellant shippers. The Commission merely instructed the shippers to comply with Rule 1.100 of the General Rules of Practice. The issue before the District Court which related to the Commission's finding under Section 1 of the Interstate Commerce

[3] See *St. Louis Southwestern Ry. Co. v. United States*, 245 U. S. 136, 139, note 2.

Act (49 U. S. C. 1) was whether the Commission had authority to determine the reasonableness of the through transportation charges assessed the "Southern Consumers" in connection with the Commission's finding that the "Southern Consumers" were entitled to an award of reparation. Appellants were aware of the fact that the validity of an order of the Commission requiring the payment of reparations cannot be challenged before a three-judge statutory court under 28 U. S. C. 2321. The appellees challenged the authority of the Commission to find that the assailed through transportation charges assessed "Southern Consumers" were unreasonable in the past and in violation of Section 1 of the Interstate Commerce Act (49 U. S. C. 1). The District Court's finding that the Commission lacked jurisdiction over the proportional rates from the Canadian origins to East Alburgh and Newport, Vermont, automatically rendered void the Commission's finding that the through transportation charges assessed the "Southern Consumers" were unreasonable in the past.

The Commission found that the defendant railroads, appellees here, had failed to establish rates from the international boundary line to Carolina destinations as required by the Act. 303 ICC at page 752 (Appendix "E", p. E-13). It was the duty of the defendant railroads, appellees here, under Sections 1(5), 6(1), and (7) of the Act (49 U. S. C. 1(5), 6(1), and (7)) to establish lawful rates from the international boundary line which reflected the transportation service rendered. Appellees' failure to do so made them under Section 8 of the Act (49 U. S. C. 8) liable for damages sustained. The Commission had authority to hear the complaints under Section 13(1) of the Act (49 U. S. C. 13(1)) and under Section 16(1) of the Act (49 U. S. C. 16(1)) had jurisdiction to award damages for the violation. Obviously the Commission had jurisdiction to determine the reasonableness of the through transportation charges

assessed. *News Syndicate Co. v. N. Y. Central R. Co., supra.*

Aside from the finding of the Commission that the appellees had failed to establish rates from the international boundary line, it is clear that such a failure exists for the factors assessed "Southern Consumers" south of East Alburgh and Newport were local rates, containing two terminal charges. Hereinbefore it has been shown that the factors of the through joint rates from East Alburgh and Newport, Vermont, to destinations in the Carolinas are local class rates or had their inception in local class rates. For the most part these applicable class rates were prescribed by the Commission in *Class Rate Investigation, 1939, supra.* These rates were designed and prescribed by the Commission to apply on local traffic and reference to the Commission's decision will show conclusively that such local rates contain two terminals—one at point of origination and the other at point of destination. The mere fact that the only legally applicable rates on asbestos and related products from East Alburgh and Newport, Vermont, to the Carolina destinations are class rates is positive proof that the appellee railroads have not complied with the statutory duty imposed upon them. Local rates are only applicable on through traffic in the absence of a more specific rate or basis of rates thereon. *Indian Refining Co., Inc. v. Louisville & N. R. Co.*, 155 ICC 380. The appellees have not complied with the Act and established rates from the international boundary line to the Carolina destinations which reflect the transportation service rendered in connection with these international shipments which moved over through routes, under through bills of lading, and interchanged at East Alburgh and Newport, Vermont, with the Canadian National Railway Company and the Quebec Central Railway Company, respectively. *Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co., supra.*

Such would be true even though we were to consider East Alburgh and Newport, Vermont, as being points on the international boundary line. The Commission, however, found at page 752 of its May 7, 1958, decision, 303 ICC (Appendix "E", p. E-13), that such points were not on the international boundary line, and in fact, the proportional rates heretofore described, maintained by the Canadian National Railway Company and the Quebec Central Railway Company to East Alburgh and Newport, Vermont, respectively, obligated those carriers to provide substantial transportation service within the United States. The Commission found that the Act makes no distinction between domestic and foreign carriers in this respect, and that all common carriers by railroad are subject to the jurisdiction of the Commission to the extent that transportation takes place within the United States. 303 ICC at page 753 (Appendix "E", p. E-14). If these findings are to stand, and they have not been challenged, then it is perfectly clear that the appellees have failed in their statutory duty to provide rates from the international boundary line to Carolina destinations which reflect the transportation service rendered. As stated, the Commission rejected the appellees' contention that they had in fact published rates from the international boundary to the Carolina destinations and held that the appellees had and were participating in international rates and as a result thereof were jointly and severally liable for any unlawfulness in such rates.

The finding of the Commission that the through transportation charges assessed "Southern Consumers" were unlawful should not be disturbed. The District Court stated that the appellees did not argue that the Commission's findings were without substantial evidentiary basis if the rates under review were to be viewed as an indivisible entity (Appendix "A", p. A-4). It is clear that it is the through transportation charges which must be considered and not

individual factors out of which such through transportation charges are constructed. "Southern Consumers" having been damaged, and the Commission having so found, they are entitled to reparation, the exact amount thereof to be determined at a later date.

It is respectfully submitted that the District Court's finding that the Commission lacked authority to determine the reasonableness of international rates for the purpose of awarding damages is of substantial and public importance.

VI

The District Court erred when it held that the proportional rates applicable from the Canadian mines to East Alburgh and Newport were not subject to the jurisdiction of the Commission.

These proportional rates were, and are, published and maintained in the same tariff which is on file with the Commission, as required by Section 6 of the Act (49 U. S. C. 6), and in which single factor joint rates are maintained to destinations in official territory. The proportionals are restricted so as not to apply to any intermediate point in Canada **but only on traffic destined to points in the United States.** Due to the method of tariff publication of through rates from Canadian mine origins to destinations in southern territory, the appellees used these proportional rates in constructing the through transportation charges assessed the "Southern Consumers". The proportionals were, and are, maintained in a published tariff which has the effect of a statute and is binding alike on the carriers and the "Southern Consumers". *Pennsylvania R. Co. v. International Coal Mining Co.*, 230 U. S. 184; *Davis v. Portland Seed Company*, 264 U. S. 403.

At page 752 of 303 ICC (Appendix "E", pp. E-13 and E-14) the Commission found that these proportional rates,

so published, obligated the Canadian lines to provide a substantial transportation service within the United States.

At page 754 of 303 ICC (Appendix "E", p. E-15) the Commission also found that the appellees' argument that it would not be practical or feasible to interchange traffic at the exact international boundary line did not affect the situation. It held that the jurisdiction of the Commission over the rail carriers applied to the extent that the carriers operated within the United States regardless of the manner of rate publication.

The appellees have not filed with the Commission rates applicable from the international boundary line to East Alburgh or Newport, Vermont. If they had published such rates, it was the duty of the appellees to so inform the Commission and say where such rates could be found. *Lewis-Simas-Jones Co. v. Sou. Pacific Ry. Co., supra.*

The Commission's finding that these proportional rates were subject to its jurisdiction is not a unique finding. In *Newsprint Paper to Detroit, supra*, the Commission held that rail carriers' failure to publish rates from the international boundary line, which was in the middle of the Detroit River, to Detroit was in violation of Section 6 of the Act (49 U. S. C. 6), and as a result the Commission had jurisdiction over the rate from the Canadian origin to Detroit. There as here a rate was published from a Canadian origin to a point in the United States and no separate and distinct rate was published from the international boundary line to the same point in the United States.

It is clear that interchange of traffic is a subject matter which deals with physical operation in the handling of traffic, whereas, publication of rates is a matter strictly subject to Section 6 of the Interstate Commerce Act (49 U. S. C. 6).

It is respectfully suggested that the District Court's holding that these proportional rates are not subject to

the jurisdiction of the Interstate Commerce Commission raises a question which is substantial and of public importance.

CONCLUSION

For the reasons stated, the questions presented by this appeal are substantial and are of public importance. It is respectfully submitted that probable jurisdiction should be noted.

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July 21, 1960.

CERTIFICATE OF SERVICE

I, E. B. Ussery, one of the attorneys for the H. K. Porter Company, Inc.—Thermoid Division—Successor in interest to Thermoid Company—Southern Division; Raybestos-Manhattan, Inc., General Asbestos and Rubber Division; Union Asbestos and Rubber Company; and Carolina Asbestos Company, appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that I have served copies of the foregoing Jurisdictional Statement on the several parties to this action, as follows:

1. On the appellees, Central Vermont Railway, Inc., *et al.*, by mailing copies in duly addressed envelopes to its attorneys of record, with air mail postage prepaid, Horace H. Powers, Esq., Railroad Terminal Building, St. Albans, Vermont, J. Edgar McDonald, Esq., 466 Lexington Avenue, New York 17, N. Y., and John F. Reilly, Esq., 750 Third

Avenue, New York 17, N. Y.; J. Raymond Hoover, Esq., Metropolitan Bank Building, Washington 5, D. C., William H. Parsons, Esq., Colorado Building, Washington 5, D. C.

2. On the United States of America, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record Honorable J. Lee Rankin, Solicitor General, and to Honorable Robert A. Bicks, Acting Assistant Attorney General, John H. D. Wigger, Esq., Attorney, United States Department of Justice, Washington 25, D. C., and Louis G. Whitcomb, Esq., United States Attorney for Vermont, Rutland, Vermont.

3. On the Interstate Commerce Commission, by mailing copies in duly addressed envelopes with air mail postage prepaid, to its attorneys of record, Robert W. Ginnane, General Counsel, and to H. Neil Garson, Associate General Counsel, Interstate Commerce Commission, Washington 25, D. C.

This 21st day of July, 1960.

E. B. USSERY,
608 Security Federal Building,
Columbia 1, S. C.